No. 83-910

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS LOCAL 249,

Petitioner,

—vs.—

PENNSYLVANIA TRUCK LINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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Questions Presented

1. Whether the decision of the Third Circuit, affirming the issuance of an injunction by the District Court, violated Section 7 of the Norris-LaGuardia Act, 47 Stat. 70 *et seq.*, 29 U.S.C. § 101 *et seq.*, Section 7 (29 U.S.C. § 107).

2. Whether the decision of the Third Circuit, affirming the decision of the District Court, is in conflict with this Court's decision in *Buffalo Forge Co.* v. *United Steelworkers of America AFL-CIO*, 428 U.S. 397 (1976).

Pennsylvania Truck Lines, Inc. is a wholly owned subsidary of Conrail Corporation.

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BRIEF IN OPPOSITION

Preliminary Statement

Respondent, Pennsylvania Truck Lines, Inc., ("Company"), pursuant to Rule 22.1 of the rules of this Court, submits this Brief In Opposition to the Petition for a Writ of Certiorari of General Teamsters, Chauffeurs, Ware-

housemen and Helpers Local 249 ("Union"), respectfully urging this Court to decline to review the decision of the United States Court of Appeals for the Third Circuit and showing:

Counter-Statement of the Case and Facts

a. Counter-Statement of the Case.

This Petition for a writ of certiorari arises out of a strike precipitated by the Company's alleged breach of the seniority provisions of a collective bargaining agreement. The Company filed the instant action in the United States District Court for the Western District of Pennsylvania against the Union under Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, to enforce the no strike and grievance and arbitration provisions of a collective bargaining agreement, requesting both injunctive relief and damages.

On July 9, 1982, at a hearing before the Honorable Alan N. Bloch, Federal District Judge for the Western District of Pennsylvania, the Company petitioned for and was granted a temporary restraining order. Jurisdiction was based upon § 301(a) of the Labor Management Relations Act, as amended, 29 U.S.C. § 185. The case was docketed at Civil Action No. 82-1326. Subsequently, on November 19, 1982, upon the Company's request for a preliminary or permanent injunction, Judge Bloch issued Findings of Fact, Conclusions of Law and a Judgment Order for a permanent injunction. On November 30, 1982, Judge Bloch denied a motion filed by the Company requesting that the District Court enter a judgment for damages based on the Judgment Order of November 19, 1982. Judge Bloch ordered that the matter of damages be settled by arbitration.

The Union filed an appeal from the Judgment Order of November 19, 1982, to the United States Court of Appeals for the Third Circuit. This appeal was docketed at No. 82-5789. The Company filed an appeal from the District Court's denial of its motion to include damages in the Order for an injunction of November 19, 1982, to the United States Court of Appeals for the Third Circuit. The Company's appeal was docketed at No. 82-5826. On August 12, 1983, the Third Circuit denied both appeals and affirmed the Orders of Judge Bloch. On September 8, 1982, and September 9, 1982, the Third Circuit denied motions of the Company and Union, respectively, for rehearing.

b. Counter-Statement of the Facts.

The Company is a motor carrier engaged in the interstate transportation of freight, including mail for the United States Postal Service, throughout the United States for and on behalf of Consolidated Rail Corporation ("Conrail"). At Conrail's Pittsburgh terminal, the Company provided Conrail with the services of ramping and deramping of containers of freight consisting of general cargo, perishable goods and mail originating at or destined to Pittsburgh. In the performance of such services at the terminal, the Company employed drivers and mechanics who were members of the Union.

On April 1, 1979, the Company entered into a labor agreement ("Agreement")[1] (JA 70a-166a) with the International Brotherhood of Teamsters, Chauffeurs, Ware-

[1] Portions of the Joint Appendix in the Third Circuit ("Joint Appendix") have been lodged with the Court and served on all parties. A citation to the Joint Appendix is noted by a "JA" followed by the corresponding page number.

housemen & Helpers of America ("IBT") and with the Union, which the District Court held consisted of: (a) the National Master Freight Agreement ("NMFA"), (b) the Teamsters Joint Council No. 40 Freight Division Local Cartage Agreement ("Local Agreement") and (c) a rider to the NMFA and the Local Agreement signed by the Company and the Union ("Rider"). The Rider expressly provided that it was supplemental to, and part of, the NMFA and the Local Agreement and it was, selfevidently, an addendum to the NMFA. The Agreement was subject to termination, cancellation, modification or revision on March 31, 1982 and, in March, 1982, it was duly extended by the Company, the IBT and the Union (JA 552a).

The Agreement prohibited strikes and lockouts and incorporated a comprehensive system for the processing and arbitration of grievances and disputes between the Company and Union (JA 88a-89a).

Despite these provisions, on July 8, 1982, without notice to the Company, the Union ordered and enforced a strike and established a picket line at the Pittsburgh Terminal because the Union believed that the Company had violated the Agreement by recalling an employee out of seniority.

Immediately upon learning of this strike, pursuant to the Agreement, the Company communicated with the Union and offered to arbitrate any dispute which the Union had with the Company (JA 20a-21a-52a). No response was received from the Union. As a result, on July 9, 1982, the Company supplied due notice to both the Union and its counsel of its intention to apply to the District Court for a Temporary Restraining Order ("TRO"), and notice of that application and a summons and verified complaint were filed by the Company in the District Court. On July 9, 1982, a hearing was held on the Company's ap-

plication for a TRO. Counsel for the Union was present at that hearing, heard the testimony of and, had an opportunity to cross examine all witnesses and made arguments on the record (JA 44a-66a) (*See,* Point I *infra*).

After due deliberation, the District Court entered an order to show cause, and issued a TRO against the Union, directing the posting of a bond, and fixed a date to hear the motion for preliminary injunction.

On October 5, 1982, the District Court held a consolidated hearing on the Company's application for a preliminary and permanent injunction, heard oral testimony and reviewed various exhibits introduced into evidence, including the Agreement. Throughout, the hearing the Union argued that it was neither a party to nor maintained an agreement with the Company and that the strike was caused not by a dispute over "seniority", but to apply economic pressure in order to force the parties to reach a new agreement. The District Court rejected this position and after a full evidentiary hearing issued its judgment order granting a permanent injunction. Specifically, the Court found that 1) the Union was a party to the Agreement and 2) the strike was over seniority, an arbitrable dispute, which, violated the no strike and grievance and arbitration provisions of the Agreement.

In rendering its decision, the Court relied on a trial record which demonstrated that:

1. On September 16, 1981, the National Freight Industry Negotiating Committee of the IBT ("Negotiating Committee") gave notice to the Company that there would be bargaining sessions "to revise or change the terms and conditions" of all agreements as provided in Article 39, Section 2 of the NMFA (JA 555a).[2]

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[2] This was not a notice to terminate the Agreement with the Company; indeed, notice of termination or cancellation was never given to the Company. On the contrary, the Agreement provided that during the negotiation of a successor agreement there was a duty to follow the grievance and arbitration procedures of the NMFA (JA 92a).

2. On October 1, 1981 the Negotiating Committee sent a letter to all employers, including the Company, which stated, in pertinent part, that: "The Teamsters National Freight Industry Negotiating Committee is the bargaining agent for each Local Union, whether or not it is a signatory to the Master Agreement or Supplements, for road, city and dock, subject to overall membership vote on any final offer that is negotiated by the Committee and the employers" (JA 559a).

3. On October 2, 1981, while the Agreement between the Company and Union was in effect, the Union advised the Company, in writing, that it proposed to "revise or change terms or conditions of the NATIONAL FREIGHT AGREEMENT, and all AREA, REGIONAL and LOCAL SUPPLEMENTS, ADDENDA, APPENDICES, or RIDERS thereto for the next contract period, as provided in Article 39, Section 1 of the NMFA" (JA 117a-118a).[3]

4. On January 7, 1982, the Negotiating Committee communicated with the Company, submitted contract proposals and arranged for continued negotiations (JA 561a).

5. On January 27, 1982, the Executive Assistant to the General President of the IBT communicated with the Company and advised that a sub-committee ("Committee") had been designated by the General President to negotiate with the Company on behalf of all of the local unions, including the Union (i.e., Local 249), with whom the Company had labor contracts (JA 562a).

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[3] It must be noted that Article 39, of the NMFA clearly provided that the Agreement would continue in effect from year to year after March 31, 1982 "unless written notice of desire to cancel or terminate the Agreement was served by either party upon the other at least sixty (60) days prior to the date of expiration (JA 117a-118a).

6. Pending a meeting with the Committee appointed by the General President of the IBT, the Negotiating Committee submitted proposals to the Company on February 9, 1982 for a new contract and advised the Company "that only the Teamsters National Freight Industry Negotiating Committee or a Sub-Committee thereof is authorized to represent the Local Union or Unions which are a party to your current agreement, even though the new agreement may not be the National Master Freight Agreement" (JA 563a).

7. On March 10, 1982, the Company communicated with the special Committee and confirmed that at the first session of the meeting with the Committee held on February 23, 1982, "YOU ADVISED US THAT YOUR COMMITTEE WAS DULY AUTHORIZED WITH FULL POWER AND NECESSARY CREDENTIALS TO MEET ON BEHALF OF ALL LOCAL UNIONS PRESENTLY HAVING NATIONAL MASTER FREIGHT AGREEMENT AND SUPPLEMENTAL CONTRACTS WITH PENNSYLVANIA TRUCK LINES" (JA 565a).[4]

8. On March 11, 1982, the Chairman of the Special Committee communicated with the Company, stating:

> ". . . our position is that we have a duly constituted Negotiating Committee sanctioned by the National Negotiating Committee to negotiate with Pennsylvania Truck Lines on behalf of all their employees, system-wide. Any tentative agreement reached by our Sub-Committee is subject to the approval of the National Committee, and if approved, will be pre-

[4] It was at this meeting that the list of local unions, including the present Union (i.e., Local 249), was presented to and accepted by the Committee as confirmation that it represented all of the locals, including Local 249 (JA 553a).

sented to the employees system-wide for ratification as to those matters which deviate from the National Master Agreement. Any Local Union, as part of the National Agreement and Supplements, are bound by the actions of the Negotiating Committee. Any objections or any Local questioning the authority of the National Negotiating Committee is to be directed to the General President, who is also Chairman of the National Negotiating Committee" (JA 566a).[5]

9. On March 19, 1982 and March 31, 1982, prior to the expiration of the Agreement, the Company entered into an agreement with the IBT and Union (i.e. Local 249) pursuant to which the Agreement was extended, subject to an undertaking by the Company that all adjustments would be made retroactive to April 1, 1982 (JA 55a).

10. On March 31, 1982 the Union was advised by letter of the agreement by the Company to make all adjustments retroactive to April 1, 1982 (JA 552a).[6]

11. In discharge of its obligation to bargain in good faith, the Company negotiated with the Committee for

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[5] The Union never introduced any evidence that it had filed with the General President any objections to the authority of the Sub-Committee.

[6] No letter was ever sent by the Union to the General President of IBT objecting to this arrangement for retroactivity, or to the negotiations, on its behalf, by the Committee nor was any appeal taken, as required under the Constitution of the IBT. Similarly, the Union never responded to the letter of March 19, 1982 advising that the Committee was authorized to negotiate separately with the Company. On the contrary, on June 14, 1982, in a grievance filed by it, the Union acknowledged and relied upon the "retroactivity agreement" (JA 549a).

the extension and modification of the NMFA and the addition of a Railhead Rider to apply throughout the United States where the Company served Conrail. The Union was advised of these negotiations. Pending the conclusion of the negotiations with the Committee, the Company continued to pay wages and grant fringe benefits to the members of the Union and contributed to the Pension and Welfare Funds of the Union, as required by the Agreement.

12. On May 6, 1982, the Company and the special Committee approved the Railhead Rider "with the understanding that a meeting of all Local Unions would be held for the purpose of explaining the procedure for conducting a secret ballot vote of the affected membership." A meeting was called by the Union and the Railhead Rider was submitted to its members for a vote by secret ballot. The Union advised its members that under the instructions of the Negotiating Committee a vote had to be taken.

13. On June 22, 1982, the Committee informed the Company that the Railhead Rider has been rejected by the membership of the various local unions with whom the Company had labor contracts, but instructed all local unions, including Local 249, that the Committee "has been granted permission to return to the bargaining table with" the Company. The notice continued by saying: "YOU ARE INSTRUCTED THAT NO ACTION BE TAKEN AGAINST THE EMPLOYER AT THIS TIME" (JA 577a). Notwithstanding this notice, the Union engaged in an unlawful strike.

14. The Union knew that the Agreement was in effect after April 1, 1982 because subsequent to that date, it submitted several grievances alleging violations of the Agreement (JA 549a-550a).

REASONS FOR DENYING THE PETITION

I. The decision of the Third Circuit, affirming the issuance of an injunction by the District Court, is not in conflict with the decisions of any other federal court nor does it offend § 7 of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*

Through a series of convoluted legal arguments, a path of tortured reasoning and a plain distortion of the relevant facts, the Union herein has petitioned to have this Court grant certiorari. Specifically, it is the Union's position that the decision of the Third Circuit, which affirmed the issuance of an injunction by the District Court, conflicts with similar decisions of other federal courts and offends the procedural safeguards of § 7 of the Norris-LaGuardia Act.

A dispassionate review of the record demonstrates that these assertions are erroneous and that certiorari should not be granted.

A. The first misstatement advanced by the Union is that certiorari should be granted because the various Circuit Courts of Appeal are divided over the question of *whether § 7 is applicable* to suits arising under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (see pages 9-11 of the Petition). This assertion is simply untrue. No conflict exists between the circuit courts on this issue.

The Union contends that a conflict exists because the Second, Third, Sixth and Ninth Circuits have ruled that an action pursuant to § 301 be accorded the full procedural protections of § 7, *Detroit Newspaper Publishers Association* v. *Detroit Typographical Union*, 471 F.2d 872 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973);

Hoh v. *Pepsico, Inc.*, 491 F.2d 556 (2d Cir. 1974); *The Celotex Corporation, Pittston Plant, Harding, Pennsylvania* v. *Oil, Chemical & Atomic Workers International Union, AFL-CIO*, 516 F.2d 242 (3d Cir. 1975); *Amalgamated Transit Union* v. *Greyhound Lines*, 529 F.2d 1073 (9th Cir. 1976), *vacated and remanded*, 429 U.S. 837, *reversed on other grounds*, 550 F.2d 1237 (9th Cir. 1977), *cert. denied*, 434 U.S. 807 (1977), while the Seventh Circuit has chosen to utilize a different approach and determine the applicability of § 7 to § 301 suits on a case by case basis. *Associated General Contractors* v. *Illinois Conference of Teamsters*, 486 F.2d 972 (7th Cir. 1973); *Local Lodge No. 1266, International Association of Machinists and Aerospace Workers, AFL-CIO* v. *Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981).

This argument is specious. In *Local Lodge No. 1266, supra*, at 290 the Seventh Circuit held:

> "Nevertheless, numerous courts have observed that the equitable principles discussed in Boys Markets (irreparable injury, a balance of hardships, etc.) parallel the findings that a court must make under § 7. Therefore these courts have concluded, § 7 is applicable in *Boys Markets* cases insofar as this section is consistent with the policies of § 301 enunciated in *Boys Markets*. In particular, the § 7 requirement of live testimony in open court (with an opportunity for cross examination) has been held to be consistent with the policies of § 301. *Amalgamated Transit Union Division 1384* v. *Greyhound Lines Inc.*, 529 F.2d 1073 (9th Cir. 1976), *vacated and remanded*, 429 U.S. 807 (1976), *reversed*, 550 F.2d 1237, *cert. denied*, 434 U.S. 837 (1977); *Celotex Corp.* v. *Oil, Chemical & Atomic Workers International Union*, 516 F.2d 242 (3d Cir. 1975); *Hoh* v. *Pepsico*, 491 F.2d 556 (2d Cir.

1974); *United States Steel Corp.* v. *UMW*, 456 F. 2d 483 (3d Cir. 1972), *cert. denied*, 408 U.S. 923 (1972).

> *We agree that the requirement of a full evidentiary hearing is consistent with the policies of § 301 announced in Boys Markets,* and that *ordinarily the district court should hear testimony from witnesses in open court before granting a preliminary injunction in aid of arbitration. Nothing we say here should be understood to detract from this general requirement."* (at pp. 290) (Emphasis supplied.)

B. The Union next incorrectly asserts that certiorari should be granted because there is an unresolved question *as to the extent* to which the procedural safeguards of § 7 are to be followed in a § 301 action (see page 11 of the Petition). However, it is obvious from a reading of the decisions cited above that no unresolved question exists. Rather, the Circuit Courts are in complete agreement that all of the procedural safeguards of § 7 are to be followed in a § 301 action. (*See,* citations above).

C. The Union also submits that the District Court erred by considering evidence adduced at an "ex parte hearing" for a TRO, as a basis for its decision to grant an injunction.[7]

This argument is without merit because the Union's consistent characterization of the hearing as ex parte is a misnomer. The hearing was not ex parte. The Union received proper notice of the hearing pursuant to Rule

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[7] The evidence demonstrated that the strike arose over a seniority dispute, a matter the trial judge found to be governed by the no strike and arbitration provisions of the parties' labor contract.

65(a) of the Federal Rules of Civil Procedure ("F.R.Civ. P.") and, as a result, dispatched its attorney to the hearing room. Although the Union's counsel refused to make a formal appearance on the record, he remained in the hearing room throughout the entire proceeding, heard all the testimony presented, had an opportunity to cross examine all witnesses and, when convenient, made legal arguments on the record.

So, too, it may be argued that the hearing was one for a preliminary injunction. This is because, ordinarily, a district court may grant a TRO without any hearing, instead relying on affidavits (*See,* F.R.C.P. 65(b)); *Hoffritz* v. *U.S.,* 240 F.2d 109 (9th Cir. 1956). Similarly, once a court finds, as it did in this case, that proper notice was given, it has the authority to convert a hearing seeking a TRO into one seeking a preliminary injunction. *Dilworth* v. *Riner,* 343 F.2d 226 (5th Cir. 1965); *Bailey* v. *Transport Communication Employees Union,* 45 F.R.D. 444 (N.D. Miss. 1968).

Assuming arguendo, that the hearing was "ex parte", consideration by the trial court of evidence obtained therein does not offend or violate § 7 of the Norris-LaGuardia Act, which provides in pertinent part that:

> "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, *except after hearing the testimony of witnesses in open court (with opportunity for cross examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the Court to the effect.* . . ." (Emphasis supplied.)

See also, Detroit & Toledo Shore Line R.R. Co. v. *Brotherhood of Locomotive Firemen & Enginemen,* 357 F.2d 152 (6th Cir. 1966).

This was the procedure followed by the District Court in the present action. Prior to the Court's issuing the permanent injunction and rendering its findings of fact, each party was provided an opportunity and did present live testimony in open court.

Furthermore, even assuming arguendo that the hearing was "ex parte" and the use of evidence adduced at it was improper, certiorari must still be denied, because the District Court secured evidence at the hearing for preliminary injunction which illustrated that the underlying reason for the strike was arbitrable (JA 456a-458a).

Lastly, the Union's contention that the hearing was "ex parte" and, therefore, violative of § 7 is not an argument which was fairly raised before either the District Court or the Third Circuit. Indeed, it is well settled that the Supreme Court generally will not consider issues "neither raised before nor considered by the Court of Appeals." *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970)

II. The decision of the Third Circuit does not conflict with *Buffalo Forge Co.* v. *United Steelworkers of America, AFL-CIO,* 428 U.S. 397 (1976).

The Union's assertion that the decision of the Third Circuit conflicts with this Court's holding in *Buffalo Forge Co.* v. *United Steelworkers of America, AFL-CIO,* 428 U.S. 397 (1976), is erroneous.

In *Boys Markets Inc.* v. *Retail Clerks Union, Local 770,* 398 U.S. 235 (1970), this Court held that if a labor con-

tract contained a mandatory grievance and/or arbitration procedure, and a strike arose over a dispute which was subject to those provisions, the strike could properly be enjoined and the parties required to arbitrate the dispute. The Court added that a district court entertaining an action under § 301 could not grant injunctive relief unless it first determined that: (1) the parties had a labor contract which contained an arbitration provision; (2) the strike sought to be enjoined was over a grievance which both sides had agreed to submit to arbitration; (3) the employer was willing to proceed to arbitration in exchange for obtaining the injunction; and (4) the injunction was warranted under traditional principles of equity.[8]

Six years later, in *Buffalo Forge, supra,* this Court held that all disputes not covered by specific and mandatory arbitration obligations could not be enjoined.

The present matter does not conflict with *Buffalo Forge* and falls squarely under the umbrella of *Boys Markets.* In the present proceeding, prior to issuing an injunction, the District Court heard testimony from both the Union and Company as to what they believed was the underlying cause of the strike and received into evidence the parties' labor agreement. After reviewing all the evidence, the Court consistent with *Boys Markets* and *Buffalo Forge,* properly issued an injunction because it made factual findings that: (1) the dispute was over "seniority", an area which it deemed was clearly covered by the no

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[8] The Court's ruling in *Boys Markets* was a natural progression from its previous decisions holding, that national labor policy favored resolution of labor disputes through arbitration. *United Steelworkers of America* v. *American Manufacturing Co.,* 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

strike and arbitration clauses of the parties' labor contract; (2) the employer was willing to arbitrate the dispute; and (3) the equities favored the granting of the injunction.

Moreover, it must be pointed out that the cases cited by the Union in support of its position are inapposite. *Jacksonville Bulk Terminals* v. *International Longshoremen's Association*, —— U.S. ——, 102 S.Ct. 2673, 73 L.Ed. 327 (1982), *Matson Plastering Co., Inc.* v. *Operative Plasterers and Cement Masons Int. Assoc., AFL-CIO, Plasterers Local Union No. 295*, 633 F.2d 1307 (9th Cir. 1980), *Waller Brothers Stone Co.* v. *United Steelworkers of America*, 620 F.2d 132 (6th Cir. 1980), and *Maiers Motor Freight Co.* v. *Local 299*, —— F.Supp. ——, 113 LRM 2823 (E.D. Mich. 1982). In each of the above cases, the parties' labor contract contained express reservations of the Union's right to strike and the underlying dispute of the strike was governed not by the agreements' arbitration and no strike provisions, as in the present case, but rather by an express reservation clause.

Notwithstanding, the Union's consistent attempts to perpetrate the fiction that the present labor contract did not cover this dispute, and that the strike occurred not over seniority, but because no contract existed, the unalterable fact is that the District Court, after holding hearings and receiving evidence, determined that the strike was subject to the grievance and arbitration and no strike provisions of the Agreement, was unlawful and had to be enjoined.

This Petition for a writ of certiorari is nothing more than an attempt to have this Court review findings of fact and factual arguments, which already have been rejected once in the District Court and twice in the Third Circuit, by recasting them as questions of law. Surely, such a disguise is not worthy of Supreme Court review.

CONCLUSION

For the reasons stated above, respondent requests denial of the petition for a writ of certiorari.

Respectfully submitted,

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